

VOLUME NO. 51

OPINION NO. 16

INSURANCE - Mont. Code Ann. § 49-2-309 requires inclusion of coverage for prescription contraceptives and related medical services;

INSURANCE - Mont. Code Ann. § 49-2-303 requires inclusion of coverage for prescription contraceptives and related medical services;

PRESCRIPTION DRUGS - Mont. Code Ann. § 49-2-309 requires inclusion of coverage for prescription contraceptives and related medical services. Mont. Code Ann. § 49-2-303 requires inclusion of coverage for prescription contraceptives and related medical services;

ADMINISTRATIVE RULES OF MONTANA - Section 24.9.1407;

MONTANA CODE ANNOTATED - Sections 49-2-303, (1), (a), -309, (1);

UNITED STATES CODE - 42 U.S.C. § 2000e-2(a)(1), (2), (k).

- HELD:
1. When an employer provides an insurance policy providing prescription drug coverage and other medical services, the Montana unisex insurance law, Mont. Code Ann. § 49-2-309, requires inclusion of coverage for prescription contraceptives and related medical services.
 2. When an employee benefit plan provides prescription drug coverage and other medical services, the Montana Human Rights Act, Mont. Code Ann. § 49-2-303, requires inclusion of coverage for prescription contraceptives and related medical services.

March 28, 2006

Senator Jon Tester
President, Montana Senate
P.O. Box 200500
Helena, MT 59620-0500

Dear Senator Tester:

You have requested my opinion on questions that I have phrased as follows:

1. Is it a violation of the provision of Montana's unisex insurance law prohibiting sex discrimination in insurance plans, Mont. Code Ann.

§ 49-2-309, if an insurance policy providing prescription drug coverage and other medical services excludes coverage for prescription contraceptives and related medical services?

2. Is it a violation of the provision of the Montana's Human Rights Act prohibiting sex discrimination in employment, Mont Code Ann. § 49-2-303, if an employee benefit plan providing prescription drug coverage and other medical services excludes coverage for prescription contraceptives and related medical services?

A. Montana's unisex insurance statute

Montana's unisex insurance statute provides, in pertinent part:

It is an unlawful discriminatory practice for a financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan, or coverage or in any pension or retirement plan, program, or coverage, including discrimination in regard to rates or premiums and payments or benefits.

Mont. Code Ann. § 49-2-309(1).

The plain language of the statute prohibits discrimination based on sex in the issuance or operation of an insurance plan. The Montana Supreme Court has found that an insurer is in violation of the unisex insurance statute if it provides men with comprehensive coverage for medical expenses, but does not provide women with similar comprehensive coverage. Bankers Life & Casualty Co. v. Peterson, 263 Mont. 156, 163, 866 P.2d 241, 245 (1993).

In Peterson, several women filed a claim with the Montana Human Rights Commission after their insurer denied them coverage for standard maternity expenses. The women alleged that refusal to provide coverage for maternity expenses constituted unlawful sex discrimination in violation of the unisex insurance statute. The Commission held for the women, the district court affirmed the Commission's conclusion, and the insurer appealed to the Montana Supreme Court.

Previously, the Court had concluded that treating women differently based upon their capacity to become pregnant constituted sex discrimination. Mountain States Tel. & Tel. Co. v. Comm'r of Labor & Indus., 187 Mont. 22, 38-39, 608 P.2d 1047, 1056 (1980). The Court in that case noted:

[p]regnancy is a condition unique to women, and the ability to become pregnant is a primary characteristic of the female sex. Thus, any classification which relies on pregnancy as the determinative criterion is a distinction based on sex. . . . “By definition, [placing pregnancy in a class by itself] discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male.”

187 Mont. at 39 (citation omitted). Relying on Mountain States, the Montana Supreme Court concluded in Peterson that discrimination based upon pregnancy is discrimination based on sex and is specifically prohibited by the Montana unisex insurance statute. 263 Mont. at 161 (also citing, Miller-Wohl Co., Inc. v. Commissioner of Labor, 214 Mont. 238, 692 P.2d 1243 (1984)).

The Court specifically rejected the insurer’s argument that covering pregnancy-related expenses would constitute reverse discrimination against men because men would be paying premiums for benefits only received by women. The Court noted that the policy at issue only contained a gender-specific exclusion related to pregnancy; no male gender specific exclusions were listed. Peterson, 263 Mont. at 164. “Absent male gender-specific exclusions in Bankers Life’s policy, women are paying premiums for benefits only men receive.” Id. The Court concluded that providing comprehensive benefits to both males and females cannot constitute discrimination to either class. Id.

Montana’s unisex insurance statute makes it unlawful for a “financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan, or coverage. . . .” Mont. Code Ann. § 49-2-309(1). In applying this statute, the Supreme Court of Montana concluded that omitting pregnancy coverage from any insurance policy is, “on its face, sex discrimination in violation of the [the unisex insurance statute]” as the statute is “intended to cover all discriminations in insurance policies that are based solely on sex.” Peterson, 263 Mont. at 162 (emphasis supplied). Contraception and related medical services such as gynecological visits, are virtually the only way for women to prevent and control the timing of pregnancy. Just as exclusion of pregnancy coverage constitutes sex discrimination because “distinctions based on pregnancy are sex-linked,” it follows that exclusion of coverage for prescription contraceptives and related medical services would also be sex discrimination and a violation of Montana’s unisex insurance statute.

B. Montana's Human Rights Act.

The Human Rights Act provides:

- (1) It is an unlawful discriminatory practice for:
 - (a) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex distinction

Mont Code Ann. § 49-2-303.

Montana courts have not ruled on whether it constitutes sex discrimination under the Human Rights Act if an employer's comprehensive benefits package excludes insurance coverage for prescription contraceptives and related medical services. However, federal law, specifically Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) ("Title VII"), requires employers that offer their employees comprehensive health plans to include prescription contraceptives.

Like Montana's Human Rights Act, Title VII provides:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer--

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1), (2). It is well settled that it is unlawful under Title VII of the

Civil Rights Act of 1964 for an employer to discriminate on the basis of sex with regard to fringe benefits, including health insurance. Moreover, Title VII, as amended by the Pregnancy Discrimination Act of 1978 (PDA), provides further specificity to Title VII's general prohibition against discrimination "because of sex."

The terms "because of sex" or "on the basis of sex: [in Title VII] include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability to work

42 U.S.C. § 2000e-2(k).

In International Union, UAW v. Johnson Controls, 499 U.S. 187 (1991), Johnson Controls implemented a policy that excluded women who were pregnant or capable of being pregnant from being placed in jobs involving lead exposure. In its use of the words "capable of bearing children," Johnson Controls explicitly classified on the basis of the potential for pregnancy. The Court found that "[u]nder the PDA, such a classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination." Johnson Controls, 499 U.S. at 199. The Court concluded that such a policy was not justifiable by any known legal exception and was prohibited by Title VII. Johnson Controls, 499 U.S. at 211. Under Johnson Controls, the condition that contraception addresses, the potential for pregnancy, was found to be a pregnancy-related condition. Johnson Controls, 499 U.S. at 199. Thus, singling out prescription contraceptive drugs and services for disadvantageous treatment in an employer's health plan must also violate the PDA and Title VII's basic nondiscrimination policies.

The Equal Employment Opportunity Commission (EEOC), the agency responsible for Title VII enforcement, has specifically ruled that an employer's failure to provide insurance coverage for prescription contraceptive drugs and devices, when other prescription drugs and devices are covered, constitutes unlawful sex discrimination under the PDA. EEOC Decision-contraception, 12/14/2000. Specifically, the EEOC has stated that to avoid violating Title VII, employers must (1) cover the expenses of prescription contraception to the same extent, and on the same terms, that they cover the expenses of other drugs, devices and preventive care; (2) offer the same coverage for contraception-related outpatient services as is offered for other outpatient services; and (3) cover the full range of prescription contraceptive choices in each of the health plans offered to employees. Id.

In addition, two federal district courts have confirmed this interpretation of Title VII. First, the United States District Court for the Western District of Washington ruled that an

employer was violating Title VII by failing to provide insurance coverage for contraception in an employee health plan that covered other prescription drugs and devices. Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266 (W.D. Wash. 2001). The Erickson court noted:

The PDA is not a begrudging recognition of a limited grant of rights to a strictly defined group of women who happen to be pregnant. Read in the context of Title VII as a whole, it is a broad acknowledgment of the intent of Congress to outlaw any and all discrimination against any and all women in the terms and conditions of their employment, including the benefits an employer provides to its employees. Male and female employees have different, sex-based disability and healthcare needs, and the law is no longer blind to the fact that only women can get pregnant, bear children, or use prescription contraception. The special or increased healthcare needs associated with a woman's unique sex-based characteristics must be met to the same extent, and on the same terms, as other healthcare needs.

141 F. Supp. 2d at 1271. The court ordered Bartell Drug Co. to cover “each of the available options for prescription contraception to the same extent, and on the same terms, that it covers other drugs, devices, and preventative care,” as well as related physician visits and outpatient services. 141 F. Supp. 2d at 1277.

More recently, in a class action suit against Union Pacific Railroad for excluding prescription contraception from its employee insurance plan, the United States District Court for the District of Nebraska concurred with the Erickson decision. In re Union Pac. R.R. Empl. Practices Litig., 378 F. Supp. 2d 1139 (D. Neb. 2005). The Nebraska Court similarly found that the exclusion of all FDA-approved prescription contraceptive methods violates Title VII because it “treats medical care women need to prevent pregnancy less favorably than it treats medical care needed to prevent other medical conditions that are no greater threat to employees’ health than is pregnancy.” 378 F. Supp. 2d at 1149. Other federal courts considering this question have similarly concluded that an employer’s exclusion of prescription contraception from an employee insurance plan gives rise to a claim for sex discrimination under Title VII. See, e.g., Cooley v. DaimlerChrysler Corp., 281 F. Supp. 2d 979 (E.D. Mo. 2003); EEOC v. United Parcel Serv., 141 F. Supp. 2d 1216 (D. Minn. 2001).

Like federal law (Title VII) Montana’s employment discrimination law provides that “[i]t is an unlawful discriminatory practice” for an employer to discriminate against an employee “in a term, condition, or privilege of employment” because of sex. Mont. Code Ann. § 303(1)(a). Since the Montana Human Rights Commission has adopted a regulation that adopts EEOC guidelines on sex discrimination, Mont. Admin. R. 24.9.1407, and since the Montana courts have found rulings under the federal statutes to be persuasive in the

application of Montana's laws, see, e.g. Harrison v. Chance, 244 Mont. 215, 797 P.2d 200, 204 (1990), the federal rulings described above are important guideposts in resolving the issue you present.

As with Title VII, Montana case law demonstrates that because pregnancy is unique to women, differential treatment related to pregnancy and related medical conditions such as gynecological visits, is discrimination on the basis of sex, and is prohibited. Bankers Life, 263 Mont. at 163; Mountain States Telephone, 187 Mont. at 38-39; Miller-Wohl, 214 Mont. at 260. As the condition that contraception addresses, the potential for pregnancy, has been deemed a pregnancy-related condition, the analysis outlined above is applicable under the Montana's Human Rights Act.

THEREFORE, IT IS MY OPINION:

1. When an employer provides an insurance policy providing prescription drug coverage and other medical services, the Montana unisex insurance law, Mont. Code Ann. § 49-2-309, requires inclusion of coverage for prescription contraceptives and related medical services.
2. When an employee benefit plan provides prescription drug coverage and other medical services, the Montana Human Rights Act, Mont. Code Ann. § 49-2-303, requires inclusion of coverage for prescription contraceptives and related medical services.

Very truly yours,

MIKE McGRATH
Attorney General

mm/pdb/jym